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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Should the doctrine of sovereign immunity be extended to bar a court order requiring the government to pay interest on regulatory relief unlawfully delayed, when the interest would be paid from funds held by the government only as custodian for the benefit of rightful claimants under a regulatory program, and not from public funds?

2. Even if the doctrine of sovereign immunity were applicable to the court order described in question No. 1, does the 1976 amendment to § 702 of the Administrative Procedure Act, abolishing the defense of sovereign immunity in actions against the government for relief other than money damages, permit a court to order the payment of interest on regulatory relief unlawfully delayed by the government?

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4 K. Davis, *Administrative Law Treatise* (2d ed. 1983)	19, 21

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UNITED STATES DEPARTMENT OF ENERGY and
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners VGS Corporation, d/b/a Southland Oil Company, and Globe Asphalt Co., Inc. ("Southland")[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals entered in this proceeding on December 9, 1986.

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[1] Pursuant to Rule 28.1 of the Rules of this Court, petitioners inform the Court that Globe Asphalt Co., Inc. is a wholly-owned subsidiary of VGS Corporation. VGS Corporation is a majority-owned subsidiary of Galaxie Corporation. Lamar Life Corporation also is a majority-owned subsidiary of Galaxie Corporation.

OPINIONS BELOW

The Memorandum Opinion and Order issued by the United States District Court for the Southern District of Mississippi on July 12, 1985 is reported at 613 F. Supp. 243 (S.D. Miss. 1985) and is reproduced in the Appendix at 11a. The Memorandum Opinion and Final Judgment of that Court are unreported and are reproduced in the Appendix at 21a and 26a respectively. The opinion of the Temporary Emergency Court of Appeals, entered on December 9, 1986, is reported at 4 Energy Mgmt. (CCH) ¶ 26,572 (1986) and is reproduced in the Appendix at 1a.

JURISDICTION

The Judgment of the Temporary Emergency Court of Appeals was entered on December 9, 1986, this petition for certiorari being filed within thirty days of that date. This Court's jurisdiction is invoked under § 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1982), as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 754 (1982).

STATUTORY PROVISIONS INVOLVED

Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194 (1982), is reproduced in the Appendix at 30a. Section 702 of the Administrative Procedure Act, as amended, 5 U.S.C. § 702 (1982), is reproduced in the Appendix at 32a.

STATEMENT OF THE CASE

This case involves the use of the sovereign immunity doctrine to bar courts from ordering complete relief from governmental misconduct in the administration of a regulatory program. The relief at issue was in the form of interest on regulatory benefits unlawfully delayed, to be paid not from public funds, but from funds held by the government solely for the benefit of rightful claimants under the regulatory program. This case raises fundamental issues about the metes and bounds of the sover-

eign immunity doctrine as it affects the full accountability of a federal agency for its regulatory misconduct.

A. The Entitlements Program And Exception Relief

Pursuant to the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 753(a) (1982), between 1974 and 1981, the Federal Energy Administration ("FEA") and, subsequently, the Department of Energy ("DOE"), administered a system of crude oil price controls, under which domestic crude oil (subject to price controls) was substantially less expensive than imported crude oil (not subject to controls). *See* 10 C.F.R. § 212.78 (1986). To address the competitive disadvantage suffered by refiners with less-than-average access to the less expensive domestic crude oil, the FEA established the Entitlements Program. 10 C.F.R. § 211.67 (1986); 39 Fed. Reg. 42246 (Dec. 4, 1974). Under the Entitlements Program, each month refiners with greater-than-average access to price-controlled crude oil were required to make cash transfer payments, through the purchase of "entitlements," to other refiners with lower-than-average access to such crude oil. The rights and liabilities of each refiner under the Program were set out in monthly "entitlements notices" issued by the government. The cash transfers mandated by the Program were strictly between refiners; no funds flowed to or from the government.

Under § 504(a) of the Department of Energy Organization Act, DOE was required to make "adjustments" to the EPAA controls, including the Entitlements Program, where necessary to alleviate "special hardship, inequity, or unfair distribution of burdens" caused by the regulatory program. 42 U.S.C. § 7194(a) (1982). These "adjustments" became known as "exceptions" and agency action under this section as "exception relief". Applications for exception relief were first considered by DOE's Office of Hearings and Appeals ("OHA"); OHA denials of relief were then appealable to the Federal Energy Regulatory Commission ("FERC"), an independent regulatory body. *See* 42 U.S.C. § 7194(b)(2) (1982); 42 U.S.C.

§ 7171(a) (1982). While the Entitlements Program was operating, final OHA or FERC orders granting exception relief were implemented promptly on the next monthly entitlements notice. Such orders either increased the number of entitlements the recipient refiner could otherwise sell, or reduced the number it otherwise was required to purchase.

B. Crude Oil Decontrol And Its Aftermath

On January 28, 1981 President Reagan, by Executive Order, exempted all crude oil and petroleum products from the price and allocation regulations. Exec. Order No. 12,287, 3 C.F.R. 124 (1986), *reprinted in* 15 U.S.C. § 757 note (1982). At the time of the Executive Order, DOE had not yet issued entitlements notices for crude oil transactions occurring in December 1980 and the first twenty-seven days of January 1981. The notice for December 1980 was issued in February 1981, 46 Fed. Reg. 14157 (Feb. 26, 1981) and DOE announced that it would thereafter issue the notice for January 1981 transactions. 46 Fed. Reg. 12946 (Feb. 19, 1981). However, from March 1981 through December 1981, a series of federal court injunctions prevented the issuance of the notice for January 1981. During this period, DOE proposed, and thereafter adopted, regulations calling for an additional "clean-up" entitlements notice implementing exception orders relating to the pre-decontrol period. 10 C.F.R. § 211.69 (1986); 46 Fed. Reg. 36092 (July 13, 1981).

Despite its earlier assurances that the 1981 and clean-up entitlements notices would be issued, DOE took no action until October 28, 1983, when it reversed its earlier position and announced its proposed decision to issue no further entitlements notices. 48 Fed. Reg. 50824 (Nov. 3, 1983). This proposal was made final on June 28, 1984. 49 Fed. Reg. 27410 (July 3, 1984).[2]

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[2] The legality of DOE's decision against the issuance of the final entitlements notices was upheld by the Temporary Emergency Court of Appeals in *Texaco, Inc. v. DOE*, 795 F.2d 1021 (Temp. Emer. Ct. App.), *cert. dismissed*, 107 S. Ct. 10 (1986).

DOE's decision against the final entitlements notices eliminated the established regulatory mechanism by which exception relief from the Program had been implemented. During the years following the issuance of the December 1980 notice, refiners continued to receive OHA and FERC orders granting exception relief based on hardship and inequity caused by the Program during its operation. DOE's failure to recognize its legal obligation to implement these post-decontrol regulatory orders gave rise to the relief granted petitioner Southland by the District Court which is the subject of this Petition.

C. FERC's 1984 Order Providing Relief To Southland

Throughout the course of the Entitlements Program, OHA had granted exception relief from the Program to petitioner Southland and other refiners who met the statutory standard of hardship or inequity. This litigation has its origins in two OHA orders issued on February 23, 1981, ("February 23 orders") by which the agency retroactively changed its method of calculating Southland's exception relief for the years 1977 and 1978 and, as a result, required Southland to pay an additional $13.4 million into the Entitlements Program. *Southland Oil Co./VGS Corp.*, 7 DOE ¶ 82,608 (1981); 7 DOE ¶ 82,576 (1981). This amount was paid by Southland through the purchase of entitlements on the December 1980 entitlements notice, issued in late February 1981. By Supplemental Order of April 1, 1981, ("April 1 order") OHA assessed an additional $1,638,068 obligation on Southland to be included on the January 1981 entitlements notice. *Southland Oil Co./VGS Corp.*, 8 DOE ¶ 82,505 (1981).

On May 13, 1981, the United States District Court for the Southern District of Mississippi granted Southland preliminary injunctive relief from the OHA orders. *VGS Corp. (Southland Oil Co.) v. DOE*, No. J81-0170(C),

slip op. (S.D. Miss. May 18, 1981).[3] The Court required entitlements payments to be made to Southland on the January 1981 entitlements notice in the amount of the February 23 orders. The Court's Order further provided that this money would be placed in an interest-bearing escrow account, along with the $1,638,068 that Southland had not yet paid under the April 1 Order, to be repaid to Southland, with interest, to the extent it finally prevailed at FERC in its challenge to the contested OHA orders. However, the objective of the injunction to protect Southland against the loss of interest income during the FERC proceedings was effectively negated by DOE's failure to issue either the January 1981 or clean-up entitlements notices.

On October 18, 1983, a FERC Presiding Officer issued a Proposed Order finding that the February 23 and April 1, 1981 OHA Orders had erroneously imposed on Southland entitlements obligations of $7,597,567. The Proposed Order relieved the company of the $1,638,038 entitlements purchase obligation imposed by the April 1 Order and provided that an additional $5,956,499 in exception relief be implemented on the final entitlements notices. *Southland Oil Co./VGS Corp.*, 25 FERC ¶ 62,118, at 63,259-60 (1983). Although issued ten days prior to DOE's October 28, 1983 announcement of its proposed decision against the publication of the final entitlements notices, the Proposed Order specifically addressed the possibility that DOE would make such a decision. The Presiding Officer ordered Southland's relief to be implemented *regardless of that decision*:

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[3] Pursuant to Rule 21.1(i) of this Court, petitioners advise the Court that the District Court found federal jurisdiction under 28 U.S.C. §§ 1331, 1361, and 2201-02, and under § 211 of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (1982), as incorporated by 5(a)(1) of the EPAA, 15 U.S.C. § 754 (1982).

> In the event no further entitlements notice is issued, DOE will take other appropriate action to implement this order.

Id. at 63,260. On May 8, 1984, just prior to DOE's final decision against the issuance of the final entitlements notices, FERC affirmed its Presiding Officer's Proposed Order, including the above-quoted language.[4] *Southland Oil Co./VGS Corp.*, 27 FERC ¶ 61,205 (1984) (the "1984 FERC Order").

D. DOE's Failure To Implement The 1984 FERC Order

Although the eight-month administrative proceeding on issuance of the final entitlements notices also had addressed the exception relief issue, DOE ended the Program without adopting an alternative means of implementing unpaid exception orders. Instead, on the same day it announced its final decision to terminate the Entitlements Program, DOE commenced yet another "public proceeding" on the exception order question, 49 Fed. Reg. 27410, 27419 (July 3, 1984), thus beginning a second round of comments and testimony on the issue.

On January 9, 1985, after six more months of agency proceedings and deliberation, DOE issued what it called its "final decision" on exception orders. 50 Fed. Reg. 1919 (Jan. 14, 1985). In direct violation of the mandatory language of § 504(a) of the DOE Organization Act as well as the FERC Orders in *Southland* and related cases, DOE determined that exception relief orders ". . . did not create any unconditional rights or obligations in the event no further Entitlements lists were published."

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[4] FERC also had adopted such language in several earlier orders granting exception relief to other refiners. *See, e.g., USA Petroleum Corp.*, 19 FERC ¶ 62,609 (1982), *aff'd*, 23 FERC ¶ 61-016 (1983); *Navajo Refining Corp.*, 21 FERC ¶ 62,521 (1982), *aff'd*, 23 FERC ¶ 61,017 (1983).

Id. at 1923.[5] Nevertheless, the Department recognized that " . . . fairness requires an attempt to use another means of granting relief to firms with adjudicated hardship." *Id.* at 1921. DOE noted that one alternative mechanism to fund exception orders was payment from crude oil refund monies held by DOE, in interest-bearing accounts, as the result of enforcement proceedings against firms charged with violating the price regulations (the "overcharge funds"). *Id.* The Department proposed to implement exception orders in this way, but only if OHA determined, in its separately-pending administrative proceedings conducted in connection with the *Stripper Well* litigation,[6] that refiners had been among those injured by the violations for which the overcharge funds had been collected. *Id.* According to DOE, such a determination would establish the overcharge funds as an appropriate surrogate for the payment of exception relief through the Entitlements Program; indeed, the Department found that "[u]se of this refund money would be entirely consistent with the effects of . . . [exception] orders issued during the period . . . of controls and the operation of the Entitlements Program." *Id.* at 1922.

OHA's *Stripper Well* proceeding did not end until June 21, 1985 when OHA found that refiners did, indeed, suffer injury from overcharge violations of the EPAA. 50 Fed. Reg. 27400, 27401 (July 2, 1985). Thus, the only precondition established by DOE for payment of Southland's relief from the overcharge funds finally had been met. Incredibly, however, DOE still paid not a

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[5] DOE's January 1985 legal conclusion was wholly at odds with the position it had taken at the time it issued its entitlements clean-up regulations in July 1981. At that time, DOE had written: ". . . [W]e cannot purport to cut off claims and obligations merely because outstanding cases are not finally determined by the date of the clean-up list." 46 Fed. Reg. 36092, 36096 (July 13, 1981).

[6] *In re the Department of Energy Stripper Well Exemption Litigation,* M.D.L. No. 378 (Theis, J.).

penny of relief to Southland nor to other refiners with unpaid orders. Instead, the Department manufactured a new excuse for non-payment, this time deciding to withhold payment pending the outcome of the *Texaco, Inc. v. DOE* litigation concerning the legality of DOE's decision against the final entitlements notices. *Id.* at 27403. Thus, the Department, without explanation, reneged on its January 1985 commitment to pay exception orders once refiner class injury was determined.

On July 12, 1985 the District Court issued a declaratory judgment of DOE's "unconditional and non-discretionary obligation" to implement the Southland FERC Order. Appendix at 17a-18a. The Court found "wholly unreasonable and insupportable" DOE's interpretation of the FERC Order as imposing only "conditional" obligations on DOE. Appendix at 18a. The District Court found DOE's position "totally frivolous," and characterized DOE's track record as one of "delay—delay—delay." Appendix at 20a.

Despite this rebuke, DOE continued to withhold Southland's relief in flagrant disregard of its legal duty. On October 2, 1985, the Department announced that it had segregated the overcharge funds sufficient to pay the Southland and other exception orders in separate accounts, but continued to withhold them until completion of the *Texaco* litigation. *Amber Refining Inc.*, 50 Fed. Reg. 41572 (Oct. 11, 1985) ("*Amber Refining* decision"). DOE also announced that it would pay interest on the exception orders, but only from October 2, 1985, a random date tied to its own announcement.

On December 4, 1985, the District Court issued a mandamus order[7] against DOE requiring the payment to

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[7] The *Southland* mandamus order was the fourth such order issued by federal district courts in cases involving DOE's failure to implement adjudicated entitlements exception relief. *See Navajo Refining Co.* v. *DOE*, No. 83-1492-M, slip op. (D.N.M. July 23,

Southland, within 20 days, of the $5,956,499 required by the 1984 FERC Order, with interest on that sum running from the date of that Order, May 8, 1984. Appendix at 26a-27a. The Court's inclusion of an interest factor made Southland whole for the loss of the time-value of its adjudicated regulatory relief during the period of DOE's unlawful failure to implement that relief. This was a loss suffered by no refiner while the Entitlements Program was operating; as noted above, the Program had implemented exception orders automatically on the next monthly entitlements notice. Six days after the District Court's grant of mandamus to Southland, the Temporary Emergency Court of Appeals ("TECA") expressed its own outrage at DOE's failure to honor adjudicated exception relief claims, when it refused to stay a mandamus order in a similar case, declaring that DOE's delay in implementing adjudicated exception orders was ". . . against the principles of good government and proper treatment of its citizens. . . ." Transcript of Proceedings at 45, *Navajo Refining Co. v. DOE*, (Temp. Emer. Ct. App. Dec. 10, 1985) (No. 10-62).

The government did not appeal the District Court's determination that DOE had acted in contravention of its legal authority in failing to implement Southland's relief. It appealed only the award of interest running from May 8, 1984 to October 2, 1985.

E. The Decision Of The Appellate Court

In its opinion in this case, TECA again condemned DOE's conduct toward exception orders recipients in ex-

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1985), *appeal dismissed as moot*, No. 10-62 (Temp. Emer. Ct. App. Mar. 10, 1986); *USA Petroleum Corp. v. DOE*, No. 84-1017, slip op. (D.D.C. Sept. 20, 1985) and *Kern Oil & Refining Co. v. DOE*, No. 85-0961, slip op. (D.D.C. Sept. 20, 1985), *appeals dismissed by stipulation*, Nos. DC-105 and DC-106 (Temp. Emer. Ct. App. Jan. 7, 1986).

traordinarily strong terms. The Court wrote that ". . . sympathy and the equities all favor the plaintiff in this case", finding that "[t]he actions by DOE over the last five years in this and other matters have simply been beyond belief." Appendix at 7a. Nevertheless, the Court, by a 2-0 vote,[8] reversed the District Court's award of interest running from the date of the 1984 FERC Order.

TECA reached this conclusion by its reading of this Court's decisions on the doctrine of sovereign immunity. According to TECA, the District Court's award of interest to Southland is barred by "the sovereign immunity rule that in the absence of a *specific* provision in a contract or statute, or express *consent* by Congress, interest does not run on a claim against the United States." Appendix at 7a (emphasis in original). According to TECA, this Court's decisions "never articulate the rationale underlying the rule, but rather simply apply it in a mechanical fashion." Appendix at 9a. For TECA, two facts alone were sufficient to invoke sovereign immunity. First, TECA found that "[t]he Treasury has the money" from which the interest would be paid, although the Court acknowledged that the overcharge funds were not part of the general fund of the U.S. Treasury but rather were in "a separate interest-bearing account . . . ." Appendix at 9a. Second, TECA found that Southland's claim was "against the United States," even though "the government has never claimed a right to the money" sought by Southland. Appendix at 9a. Finding no express statutory waiver of sovereign immunity, the Court held the interest award barred.

Thus, despite finding DOE guilty of egregious misconduct in its administration of a regulatory program, TECA found the courts powerless to provide a complete remedy for the harm caused by that misconduct.

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[8] Judge Duniway, a member of the original three-judge panel, died without having participated in the decision.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS AN UNJUSTIFIED EXTENSION OF THE SOVEREIGN IMMUNITY DOCTRINE

TECA's self-described "mechanical" application of the general rule against the award of interest on claims against the government caused it to extend that rule to a class of cases to which it heretofore has never been applied. TECA simply failed to consider the distinguishing characteristics of the District Court's award of interest to Southland.

A. The Rule Barring Interest On Claims Against The Government Has Been Limited To Interest Accruing On Funds To Which The Government Has Asserted A Right

The cases in which this Court has invoked sovereign immunity to bar interest awards share a fundamental similarity: the disputed interest had accrued on funds which the federal government had collected for its own benefit and asserted were its own. The two decisions on which TECA primarily relied are illustrative.[9]

United States v. Louisiana, 446 U.S. 253 (1980) involved a dispute between the federal government and the State of Louisiana over ownership of various offshore oil leases. By agreement between the parties, the disputed proceeds from the leases were impounded in the United States Treasury until the resolution of the ownership issue. After Louisiana was awarded some of the

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[9] In addition to the cases discussed below, TECA cited this Court's recent 6-3 decision in *Library of Congress v. Shaw*, 106 S. Ct. 2957 (1986). The central issue in *Shaw*, however, was not whether sovereign immunity was applicable, but rather whether Title VII of the Civil Rights Act of 1964 had waived sovereign immunity so as to permit the recovery of interest on court-awarded attorneys' fees. Petitioners here argue that the issue of waiver does not arise, because sovereign immunity is inapplicable in the first instance.

impounded funds, it asserted a claim for the interest which had accrued on the awarded funds. The Court denied interest, invoking the general immunity of the United States from interest claims absent express provision for interest in a contract or statute. *Id.* at 264. There was, of course, no question that the government had collected the disputed lease proceeds for its own benefit. Thus, Louisiana's interest claim was against the United States because it was a claim for interest on funds which the federal government had asserted were its own.

This is also true of the interest claim in *United States v. N.Y. Rayon Importing Co., (#2)*, 329 U.S. 654 (1947). *N.Y. Rayon* involved a claim for interest on customs duties which had been erroneously imposed. Again, there was no doubt that the disputed duties were funds which the government had collected for its own benefit and had asserted were its own.

The decisions cited in the *Louisiana* and *N.Y. Rayon* opinions also illustrate the point. Each case involved a claim for payment of a debt with government funds. For example, the issue in *Smyth v. United States*, 302 U.S. 329 (1937), was the plaintiff's right to interest on government bonds; in *Albrecht v. United States*, 329 U.S. 599 (1947), it was interest on the purchase price for land bought by the government for its own use; and in *Tillson v. United States*, 100 U.S. 43 (1879), and *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947), it was interest on amounts due under contracts entered into by the government.

In contrast, this Court has found the government's immunity from interest inapplicable in cases brought against the government, but not involving claims of debts owed by the government. These cases arose from claims made by private citizens under the Trading with the Enemy Act, a wartime statute under which the govern-

ment was empowered to seize the property of persons regarded as enemies of the United States, property which was then subject to the claims of other persons with legal rights against such enemies. In *Miller v. Robertson*, 266 U.S. 243 (1924), plaintiff filed suit under the Act against the Alien Property Custodian and the Treasurer of the United States, alleging that certain German citizens whose property had been seized by the United States were in breach of a contract with the plaintiff. This Court affirmed the lower court's grant of interest to the plaintiff on the funds recovered, even though the statute contained no provision for the payment of interest. The Court held the sovereign immunity doctrine inapplicable:

> While the suit . . . is one against the United States, the claim was not against it. No debt was alleged to be owing from it to the plaintiff. The rule of sovereign immunity from liability for interest . . . does not apply.

Id. at 257. *See also Henkels v. Sutherland*, 271 U.S. 298 (1926) (Court permitted recovery of interest by plaintiff on proceeds from government's sale of plaintiff's securities which had been wrongfully seized under Trading with the Enemy Act). The Court of Appeals for the D.C. Circuit later followed *Miller* in allowing the recovery of interest on a claim made under the Act, rejecting the argument that amendments to the Act since *Miller* had given the United States "something more than a custodial interest in the enemy property held by it so as to characterize Section 34 proceedings not only as suits against a sovereign but also as claims against a sovereign. . . ." *Brownell v. Bank of American Nat. Trust & Savings Ass'n*, 214 F.2d 855, 857 (D.C. Cir.), *cert. denied*, 348 U.S. 864 (1954).

These cases demonstrate TECA's misreading of this Court's sovereign immunity jurisprudence. Contrary to TECA's "mechanical" approach to the issue, this Court's decisions have turned on the nature of the relationship

between the government and the funds or property against which the plaintiff's claim is made. Where the government has acted as a custodian or stakeholder as to the funds or property sovereign immunity has been held not to apply, regardless of whether government agencies were named defendants or whether the funds or property were held in the United States Treasury. As will become evident, this case is a classic instance of a claim on funds on which the government itself has never asserted an interest beyond that of a custodian for the benefit of those with rightful claims on the funds.

B. The Doctrine Of Sovereign Immunity Should Not Be Extended To Bar Interest On Regulatory Relief To Be Paid From Funds Held By The Government Only For The Benefit Of Others

This case involves no claim on funds which the government has asserted are its own. Rather, it involves a claim for relief from a regulatory program using funds which the government concedes are not public funds, but rather were collected for the benefit of the rightful claimants under the regulatory program.

The overcharge funds from which Southland's interest would be paid are held by DOE pursuant to its authority under § 209 of the Economic Stabilization Act, 12 U.S.C. § 1904 note (1982), as incorporated in the EPAA, 15 U.S.C. § 754(a) (1982), to effect "restitution" of funds received in violation of the price regulation. DOE itself has acknowledged that it has "no pecuniary interest" in the overcharge funds, *Coline Gas Corp.*, 9 DOE ¶ 82,508, at 85,052 (1981) and TECA has declared that DOE has a "*duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717, 723 (Temp. Emer. Ct. App.), *cert. denied*, 459 U.S. 877 (1982) (emphasis in original). TECA's inclusion of the phrase "with interest" in its *Citronelle* holding is itself starkly inconsistent with the idea that the payment

of interest from the overcharge funds raises the sovereign immunity issue. DOE functioned simply to collect funds from regulatory violators and restore them to the victims of the violations, with interest. That the government itself asserted no proprietary claim on the funds was made unequivocally clear by DOE in its Supplemental Order in *Placid Refining Co.*, 14 DOE ¶ 85,111 (1986), when it wrote:

> . . . [T]he crude oil overcharge moneys involved in this proceeding *are not public funds*, but are funds obtained from private parties and *held by the DOE for distribution to injured parties* pursuant to its restitutionary authority under applicable statutes.

Id. at 88,199, n.1 (emphasis added). Thus, Southland's claim for regulatory relief to be paid from the overcharge funds, and interest thereon, is a claim on funds which the government has collected, and maintains, subject to the claims of others on the funds. As in the cases decided under the Trading with the Enemy Act, sovereign immunity does not apply.[10]

It is true, as TECA indicated, that in *N.Y. Rayon* interest was held barred by sovereign immunity even for the period following the final determination that the customs duties had been wrongfully collected and the government had no claim on them. The *N.Y. Rayon* case nevertheless is distinguishable from the present case because in *Rayon* the government had originally claimed a right to the customs duties; the government has never

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[10] That the District Court's award of interest to Southland involved no diversion of public funds should be contrasted with the cases in which this Court has applied sovereign immunity because the plaintiff had made a claim on public funds. In *Dugan v. Rank*, 372 U.S. 609, 621 (1963), the Court made a specific finding that the judgment would " 'expend itself on the public treasury . . .' ", (citing *Land v. Dollar*, 330 U.S. 731, 738 (1947)). In *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963), the Court relied on the fact that the order requested would "cause . . . the disposition of property admittedly belonging to the United States."

claimed an interest in the overcharge funds apart from its restitutionary obligations. *N.Y. Rayon* is also distinguishable because the interest denied the plaintiff in that case presumably accrued to the benefit of the government; in contrast, the interest denied Southland accrued to the benefit of the other claimants on whose behalf the government collected and maintains the overcharge funds. Moreover, if *N.Y. Rayon* is to be read broadly to bar interest claims on funds held for the benefit of others, then the decision must be regarded as directly contrary to *Miller v. Robertson*, a conflict which this Court should resolve.

TECA's decision also suggests that the application of sovereign immunity should not turn on the characteristics of the overcharge funds because DOE could have chosen a different method to pay exception orders in the absence of the final entitlements notices. Appendix at 10a. TECA overlooked the fact that the choice of the overcharge funds was necessitated by the need for a regulatory surrogate for the Entitlements Program which would impose the costs of regulatory relief on the same parties who bore them during the operation of the Program. *See* discussion *supra*, p. 8. The use of government funds to pay exception orders would not have been appropriate because such funds were never used in the operation of the Entitlements Program. The government's relationship to the overcharge funds was the same as its relationship to the cash transfers under the Entitlements Program; it effected transfers of funds between private parties, but never made a claim on the funds for itself. Thus, just as the payment of interest on cash transfers made under the Entitlements Program would not have raised the barrier of sovereign immunity,[11] neither should

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[11] In point of fact, the issue whether refiners should be paid interest on exception relief unlawfully delayed never arose during the Entitlements Program because the Program functioned to effectuate adjudicated exception orders on the next monthly entitlements notice.

the payment of interest on entitlements claims from the overcharge funds. This was implicitly conceded by DOE itself when it decided, in its *Amber Refining* decision, to use the overcharge funds to pay refiners interest on unpaid exception orders from the arbitrarily chosen date of October 2, 1985. *Amber Refining Inc.*, 50 Fed. Reg. at 41575.

TECA's decision has important implications for any situation in which the government acts as a custodian, stakeholder or trustee with respect to funds or property. As the Trading with the Enemy Act cases suggest, the EPAA price control program was not the first instance of this governmental function, nor will it be the last.[12]

II. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE ABOLITION OF THE SOVEREIGN IMMUNITY DEFENSE IN THE 1976 AMENDMENT TO SECTION 702 OF THE ADMINISTRATIVE PROCEDURE ACT

TECA's reversal of the District Court's interest award is directly contrary to the language and intent of the 1976 amendment to § 702 of the Administrative Procedure Act ("APA"). Pub. L. No. 94-574, § 1, 90 Stat. 2721 (1976). The relevant provision reads:

> An action in a court of the United States seeking relief other than money damages and stating a claim

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[12] A recent example of this function is provided by the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985). This statute allows states which already have radioactive waste disposal facilities to impose surcharges on other states for the use of the existing facilities. A portion of the surcharge money is to be transferred to an escrow account held by the Secretary of Energy. The statute makes the Secretary trustee for the funds, which "shall not be the property of the United States." 42 U.S.C.A. § 2021e(d)(2)(A) (West Supp. 1986). These monies are then to be refunded to states according to their progress in developing their own facilities. The statute is silent on the payment of interest on these refunds.

> that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief thereon be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1982). As Professor Davis has written of this provision: "Sovereign immunity in suits for relief other than money damages is no longer a defense. The United States is liable in such suits as if it were a private party." 4 K. Davis, *Administrative Law Treatise* § 23:19, at 192 (2d ed. 1983).

DOE itself has conceded that Southland's action to enforce its FERC order was not a claim for "damages," but rather for "regulatory relief." Brief of Defendants-Appellants, at 23, *VGS Corp. v. DOE*, (Temp. Emer. Ct. App., filed Jan. 31, 1986) (No. 5-119). Likewise, the District Court's award of interest dating from May 8, 1984 was not an award of money damages, but was rather a command by the Court, issued as part of a mandamus order, requiring DOE to supplement the regulatory relief ordered by FERC to compensate Southland for DOE's unlawful delay in implementing the 1984 FERC order. As noted earlier, DOE itself had decided to pay interest on unpaid regulatory relief, but only running from October 2, 1985, an arbitrary date with no restitutionary justification whatever. Put simply, the District Court exercised its equitable authority to order DOE to provide greater regulatory relief than DOE had been willing to provide.

The legislative intent of the 1976 amendment was to permit courts to do precisely what the District Court did in this case: to use their equitable powers to provide relief for wrongs committed by the government. In reporting the bill favorably, the House Judiciary Committee wrote:

> Congress has made great strides toward establishing monetary liability on the part of the Govern-

> ment for wrongs committed against its citizens by passing the Tucker Act of 1875, 28 U.S.C. sections 1346, 1491, and the Federal Tort Claims Act of 1946, 28 U.S.C. section 1346(b). S.800 would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages such as an injunction, declaratory judgment, or writ of mandamus.

H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6121 ("House Committee Report"). The Committee found that "the time now [has] come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *Id.* at 9.

Although Southland vigorously asserted to TECA that the 1976 amendments to the APA made the sovereign immunity defense unavailable to DOE,[13] the decision below fails to address this argument. The consequence of the Court's silence is not simply the failure to compensate Southland for the injury caused by DOE's misconduct. Thirteen other refiners were similarly situated with adjudicated claims of regulatory relief aggregating approximately $69 million[14] which went unpaid by DOE until the federal courts intervened. According to DOE's own figures,[15] these refiners lost an aggregate of $100 million in interest during the period when their adjudicated regulatory relief went unpaid. The use of the shield of sovereign immunity to preclude a remedy for injury of this magnitude from governmental wrongdo-

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[13] Brief of Plaintiffs-Appellees Southland Oil Company and Globe Asphalt Co., Inc. at 22-23, *VGS Corp. v. DOE* (Temp. Emer. Ct. App., filed Feb. 25, 1986) (No. 5-119).

[14] *Amber Refining Inc.*, 50 Fed. Reg. at 41579 (Oct. 11, 1985).

[15] Reply Brief of Defendants-Appellants at 4, *VGS Corp. v. DOE*, (Temp. Emer. Ct. App., filed March 11, 1986) (No. 5-119).

ing is precisely the kind of result which the 1976 APA amendment was designed to avoid.[16]

Finally, TECA's use of the sovereign immunity doctrine to preclude equitable relief to Southland is contrary to the broad interpretation of the 1976 amendment given by other federal circuit courts. For example, the Ninth Circuit recently adopted Professor Davis' view that:

> "[A]bolition of sovereign immunity in § 702 is not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages. . . .'"

Assiniboine and Sioux Tribes v. Board of Oil and Gas, 792 F.2d 782, 793 (9th Cir. 1986) (quoting 4 K. Davis, *Administrative Law Treatise* § 23:19, at 195 (2d ed. 1983)).[17] This Court, however, has never addressed the scope of the amendment. It should do so in this case, where the injury from agency misconduct was so great and the violation of Congressional intent by the Court below so patent.

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[16] DOE made two arguments to the appellate court concerning the 1976 amendment. First, it asserted, without explanation, that the decision in *United States v. Louisiana*, 446 U.S. 253 (1980) demonstrated the irrelevance of that statute, even though the opinion in *Louisiana* never mentioned the statute. Second, it mischaracterized the relevant provision as a "judicial review provision" not applicable to DOE. As the legislative history makes clear, the 1976 statute does not provide for judicial review, but rather functions to "remove the defense of sovereign immunity as a bar to judicial review of Federal administrative action *otherwise subject to judicial review*." House Committee Report, at 1 (emphasis added). *See Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728 (1982).

[17] *See also Jaffee v. United States*, 592 F.2d 712, 718 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *B.K. Instrument, Inc. v. United States*, 715 F.2d 713, 724-25 (2d Cir. 1983); *Warin v. Dept. of Treasury*, 672 F.2d 590, 591 (6th Cir. 1982); *Sheehan v. Army & Air Force Exchange Service*, 619 F.2d at 1139.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January 8, 1987

APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-119

VGS CORPORATION d/b/a SOUTHLAND OIL COMPANY and
GLOBE ASPHALT CO., INC.,
PLAINTIFFS-APPELLEES,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
for the Southern District of Mississippi

(Civil Action No. J81-0170)

(Argued June 4, 1986 Decided November 28, 1986
Judgment Entered: December 9, 1986)

DENNIS A. HENIGAN, Foley & Lardner, Washington, D.C., with whom Edwin Jason Dryer and Jack L. Lahr of the same firm, Alex A. Alston, Jr., Thomas, Price, Alston, Jones & Davis, Jackson, Mississippi, were on the brief for Plaintiffs-Appellees.

SAMUEL SOOPPER, Attorney, Office of the General Counsel, United States Department of Energy, Washington, D.C., with whom Catherine C. Cook and Dennis M. Moore, Attorneys, were on the brief for Defendants-Appellants.

Jerry E. Rothrock and Harry R. Silver, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., for *Amicus Curiae* Beacon Oil Company.

Sheldon Oliensis, Myron Kirschbaum, Robert B. Bernstein, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., A. J. Losee, Losee & Carson, Artesia, New Mexico; Henry L. Stern, Holly Corporation, Dallas, Texas, and Thomas W. Houghton, Mayor, Day & Caldwell,

Houston, Texas, Of Counsel, for *Amicus Curiae* Navajo Refining Company.

Before METZNER, DUNIWAY * and WEIGEL, Judges.

METZNER, Judge

The Department of Energy (DOE) appeals from that part of a mandamus order entered in the United States District Court for the Southern District of Mississippi which directed DOE to pay prejudgment interest from May 8, 1984, to the appellee VGS Corporation, d/b/a Southland Oil Company (Southland). DOE complied with the order for the period October 2, 1985 to December 20, 1985, when it paid Southland the principal amount due. The subject of this appeal is the liability of DOE to pay prejudgment interest for the period from May 8, 1984 to October 2, 1985.

The Department of Energy Organization Act authorizes exception relief from the Petroleum Price and Allocation Regulations, including the entitlements program,[1] for those parties adversely affected by the operation of these regulations. 42 U.S.C. § 7194. Exception relief was awarded on a case by case basis to alleviate serious hardship or gross inequity attributable to the impact of the DOE regulations on a refinery. 10 C.F.R part 205, subpart D. This relief, awarded prospectively by the Office of Hearings and Appeals (OHA), excused refiners from certain future entitlements obligations for a specified period. Since this relief was based on a projection of a firm's future performance, it was subject to a subsequent review of actual data at the end of the year.

After OHA conducted its review at the end of a refiner's fiscal year, it would issue a final order regarding

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* Judge Duniway died without having participated in the decision in this matter.

[1] *Cities Service Co. v. Federal Energy Administration*, 529 F.2d 1016 (TECA 1975), *cert. denied*, 426 U.S. 947 (1976).

the relief that the firm was entitled to for the year. If the review determined that the firm was entitled to more exception relief than it had received during the fiscal year an order was issued directing that the refinery be allowed to sell an appropriate number of entitlements on the next entitlements notice. Conversely, if less exception relief should have been granted during the year, the firm was required to purchase additional entitlements on the next entitlements notice.

The details of the entitlements program have been thoroughly delineated in earlier opinions of this court and need not now be repeated. *See, Husky Oil Co. v. Department of Energy*, 582 F.2d 644 (Temp. Emer. Ct. App. 1978); *Cities Service Co. v. Federal Energy Administration*, 529 F.2d 1016 (Temp. Emer. Ct. App. 1975), *cert. denied*, 426 U.S. 947 (1976); *Pasco, Inc. v. Federal Energy Administration*, 525 F.2d 1391 (Temp. Emer. Ct. App. 1975).

On February 23, 1981, OHA had issued two orders which changed the method of computing Southland's exception relief for the years 1977 and 1978. As a result Southland was found to have received excessive prospective exception relief and was required to purchase an additional $13.4 million in entitlements on the next monthly notice. This obligation was included in the December 1980 entitlements notice which was issued in February 1981, after President Reagan had ended the price control program. Southland made the additional entitlements purchases. On April 1, 1981, OHA modified the original orders to assess an additional purchase obligation of $1,638,068. This obligation was to be reflected on the next entitlements notice which would have been for January 1981, the last month before decontrol. Although this notice would customarily have been issued by the end of March, it had not been issued by the date of the OHA order.

Southland brought suit in federal court seeking declaratory and injunctive relief from these three orders. The district court issued a preliminary injunction in favor of Southland on May 13, 1981. This injunction required that the January 1981 entitlements notice, which had not as yet been issued, should include entitlements sales on Southland's behalf equal to the sum Southland had paid for entitlements under the OHA orders of February 23, 1981. The injunction further required that when Southland received this money, it should be placed in an interest-bearing escrow account along with the $1,638,068 that Southland had not yet paid under the April 1, 1981 order. The fund was to be used to repay Southland to the extent it prevailed before the Federal Energy Regulatory Commission (FERC) where Southland was administratively challenging the contested OHA orders.

In July 1981 DOE published a regulation establishing a clean-up entitlements notice. In August it then sought to dissolve the preliminary injunction because of the existence of the July regulation. It stated to the court:

> "Southland alleged here that it would suffer injury because there was no mechanism in place that would assure that Southland would receive its money when and if it prevailed in its application for exception relief. That mechanism is now firmly in place . . . ."

The court denied the motion to lift the injunction.

Nothing further happened in this matter until July 6, 1982, when DOE announced that it was seeking public comments as to whether it should publish the January entitlements notice. 47 Fed. Reg. 30,279 (July 13, 1982). If these notices were not published, the district court's preliminary injunction could not be implemented.

On October 18, 1983, a FERC presiding officer issued a proposed order finding that the disputed OHA orders of February 23, 1981 and April 1, 1981 improperly calcu-

lated Southland's exception relief. *Southland Oil Co./VGS Corp.*, 25 FERC ¶ 62,118. The proposed order sought to make Southland whole by relieving it of the remaining purchase obligation of $1,638,068 under the April 1 order, and by providing that an additional $5,956,038 be transferred to Southland in the form of entitlements payments on the next entitlements notice. The January 1981 notice had still not been issued. On May 8, 1984, FERC adopted this proposed order as a final order. *Southland Oil Co./VGS Corp.*, 27 FERC ¶ 61,205.

On June 28, 1984, DOE decided not to issue further entitlements notices. At that time, however, it stated that it would initiate a public proceeding to consider how to implement outstanding exception relief. On January 9, 1985, DOE decided that it would use crude oil overcharge funds held by DOE in the *Stripper Well*[2] litigation to pay holders of exception relief, but only if OHA found that refiners were injured as a class by violations of energy price regulations. OHA so found on June 21, 1985. 50 Fed. Reg. 27,400, 27,401 (July 2, 1985). DOE also stated that payments would be withheld because of the continuing litigation in *Texaco v. Department of Energy*, and that "any payment pursuant to this order will be placed in an interest-bearing escrow account pending the outcome of that litigation." *Id.*

On July 12, 1985, the scene moves back to the district court which at that time issued a declaratory judgment that DOE had an "unconditional and non-discretionary obligation" to pay Southland. The court found DOE's position regarding method and timing of payment to be "totally frivolous," and its record to be one of "delay-delay-delay."

DOE honored this order on October 2, 1985, to the extent of segregating funds in the *Stripper Well* account

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[2] *In re The Department of Energy Stripper Well Exemption Litigation*, M.D.L. No. 378 (Theis, J.).

necessary to pay exception orders. It established separate interest-bearing accounts in the United States Treasury for each claimant to be released upon the completion of the *Texaco* litigation. *Amber Refining Inc., et al.*, 50 Fed. Reg. 41,572 (October 11, 1985). DOE announced that interest on the exception orders would start to run from October 2, 1985.

On December 4, 1985, the district court ordered full restitution to Southland within 20 days. In addition, DOE was directed to pay interest on the amount due from May 8, 1984, the date of the FERC order. The basis for this direction was twofold: (1) Southland's recovery was liquidated at that time, and (2) DOE's objection to honoring the FERC order was frivolous. An order directing payment of exception relief had been entered in *Navajo Refining Co. v. Department of Energy* in September 1985, and a request for a stay in that case was argued before this court on December 10, 1985. The stay was denied at the conclusion of oral argument. Judge Daugherty stated at the time that "the public interest is fundamentally against the delay imposed by D.O.E. in this case, and . . . against the principles of good government and proper treatment of its citizens, including its corporate citizens . . . ." *Navajo Refining Co. v. Department of Energy*, TECA No. 10-62. Transcript of Proceedings, December 10, 1985, at 45.

On December 20, 1985, DOE paid Southland the exception relief awarded by FERC, but included interest only from October 2, 1985. It appealed that part of the court's order requiring it to pay interest from May 8, 1984, the date of the FERC order, to October 2, 1985.

Discussion

This case involves two separate and distinct issues. First, DOE contends that under the doctrine of sovereign immunity it is entirely immune from any claim of prejudgment interest. Second, it contends that even if it is

not immune, the district court abused its discretion in awarding interest in this case. Since the doctrine of sovereign immunity precludes an award of prejudgment interest against DOE, it is unnecessary to reach the question as to whether the district court abused its discretion which would call for a reversal of the judgment.

At the outset I want to state that symypathy and the equities all favor the plaintiff in this case. The actions by DOE over the last five years in this and other matters have simply been beyond belief. This court and several district courts have made this point clear. However, these considerations are not helpful to the plaintiff in this case.

The Supreme Court has frequently reaffirmed over the past several decades the sovereign immunity rule that in the absence of a *specific* provision in a contract or statute, or express *consent* by Congress, interest does not run on a claim against the United States. As will become evident in the ensuing discussion, "claim against the United States" has been broadly construed and has not been limited to the public fisc.

The stringency of the rule is clearly apparent in the Court's most recent discussion of the rule in *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986). In that case the Court was concerned with a judgment awarding an employee back pay rights with interest against the government under the civil rights acts. Title VII provides that the United States would be liable "the same as a private person." The wording was held not to have been express enough to award interest against the government. The Court took pains to emphasize that "policy, no matter how compelling, is insufficient, standing alone, to waive this immunity." *Id.* at 2965.

In *United States v. Louisiana*, 446 U.S. 253 (1980), the parties had agreed that payments made to the United States on leases of offshore oil land were to be impounded

in a separate fund in the United States Treasury pending determination of the ownership of the land. Although the moneys were commingled with the general funds of the Treasury, a separate account had been established on the books of the Treasury. "This was much more than a recordkeeping device. The receipts were never treated as governmental revenues." *Id.* at 264. The Court held, under the long-expressed doctrine noted above, that the United States has fulfilled its obligation under the agreement, and "that there is no liability on the part of the United States for interest or for the use of the funds; and that the United States has no further obligation for payment beyond those it has performed." *Id.* at 266.

In *United States v. N. Y. Rayon Importing Co., Inc. (#2)*, 329 U.S. 654 (1947), custom duties had been paid erroneously by two corporations. Protests were filed and the Customs Court sustained the protests. The amount of refund was ascertained by the court and checks were issued to the corporations. Because the corporations had been dissolved in the interim, the checks were transmitted to the General Accounting Office where they were deposited in a trust fund in the Treasury. While the funds were commingled with other moneys, their existence in a trust fund was established by bookkeeping entries. The court below had awarded interest for the period after the issuance of the checks. Although the Court was construing a different provision than the one at issue in this case, it pointed out that the section merely "codifies the traditional rule regarding the immunity of the United States from liability for interest on unpaid accounts or claims." *Id.* at 658. The Court said at 663:

> "Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy. We reiterate that only express language in a statute or contract can justify the imposition of such interest."

It is significant that the Court has never considered the nature of the account to be in any way important. It makes no difference whether the money has been set up as a "separate trust fund" or a "separate account" or, as in this case as a separate interest-bearing account in the United States Treasury. Nor has the existence of strong equities, as in the *N.Y. Rayon* case, had an impact on the Court's views. The cases never articulate the rationale underlying the rule, but rather simply apply it in a mechanical fashion. The Treasury has the money and the claim is against the United States to recover that money. This is sufficient to bring sovereign immunity into play.

It is argued that sovereign immunity does not apply in this case because the government has never claimed a right to the money. While this might distinguish *Louisiana, supra*, it certainly does not remove the obstacle presented by the *N.Y. Rayon* case. In that case, while it is true that the government at one point claimed it had a right to the money, it was finally determined that the money belonged to the corporations. After the checks were issued, the government had no claim to these funds. The government was merely holding the money until the rightful owner appeared. Nevertheless, the Supreme Court denied the availability of interest to the claimants under the doctrine of sovereign immunity.

Relief in this action was predicated on Section 504(a) of the Department of Energy Organization Act, 42 U.S.C. § 719(a). There is no provision for the payment of interest in that Act. While Section 209 of the Economic Stabilization Act, 12 U.S.C. § 1904, has been interpreted to permit an award of interest against a private party, *United States v. Exxon Corp.*, 773 F.2d 1240, 1278-79 (Temp. Emer. Ct. App. 1985), such interest may not be awarded against the government. At any rate, provision for the payment of interest must be express in the statute under consideration. In *Library of Congress v. Shaw*,

supra at 2961, the Court said: "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." Similar language is found in the *N.Y. Rayon* case, *supra* at 659:

> "[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."

The judgment entered by the court below flowed from its finding on July 12, 1985, that DOE had an "unconditional and non-discretionary obligation" to pay to the plaintiff. This obligation had nothing to do with the overcharge fund. The importance of the fund is simply that DOE chose to pay its liability out of that fund if *Texaco, supra,* was reversed, which it was. The choice by DOE of how it would pay the judgment has no bearing on whether sovereign immunity applies to the judgment itself. If the overcharge fund did not exist, DOE would have had to pay the judgment some other way.

The part of the order appealed from is reversed, and the provision for payment of interest from May 8, 1984 to October 2, 1985 is vacated.

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
JACKSON DIVISION

Civ. A. No. J81-0170(B)

VGS CORPORATION d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF ENERGY
and JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants.

July 12, 1985

As Amended Aug. 20, 1985

MEMORANDUM OPINION AND ORDER

BARBOUR, District Judge.

The Court has before it the following Motions:

(1) Motion of Plaintiffs, VGS Corporation, d/b/a Southland Oil Company and Globe Asphalt Co., Inc. (hereinafter collectively referred to as "Southland") for Partial Summary Judgment; (2) Motion of Defendant, United States Department of Energy ("DOE") to Dismiss; and (3) Motion of DOE to stay.

1. *Motion of Southland for Partial Summary Judgment and Motion of DOE to Dismiss*

Southland seeks a declaratory judgment that the DOE has an unconditional and non-discretionary obligation to

implement an order issued by the Federal Energy Regulatory Commission (FERC) on May 8, 1984, requiring DOE to restore to Southland $5,956,499.00 which DOE wrongfully required Southland to pay under the Crude Oil Entitlements Program. According to Southland the DOE has not only failed to implement the FERC Order, but has also unilaterally imposed additional conditions to obtaining relief by virtue of its January 9, 1985, decision which provides that the Office of Hearing and Appeals ("OHA") will implement the relief if the OHA determines that refiners as a class were injured by violations of the Emergency Petroleum Allocation Act ("EPAA").

After oral argument before the Court, on the parties' Motions, DOE notified the Court that the OHA announced on June 21, 1985, that an appropriate portion of crude oil overcharge funds will be used to fund outstanding, finally adjudicated "receive orders" such as that held by Southland and that an appropriate procedure would be implemented to provide the relief. However, because of litigation concerning the termination of the entitlements program, *e.g.*, *Texaco, Inc. v. DOE*, TECA Nos. 3-44 through 3-49, payment of the "receive orders" will be placed in an interest-bearing escrow account pending the outcome of *Texaco*.

[1] DOE asserts that the OHA decision renders the instant litigation moot. Southland argues that the OHA decision of June 21, 1985, places yet another condition on the May 8, 1984, unconditional FERC order. Southland notes that the *Texaco* litigation is now in the briefing stage before the Temporary Emergency Appeals Court and that the United States Supreme Court may yet have to ultimately determine whether the entitlements lists will be published. Then, Southland comments that other pending litigation will have to decide the accuracy of the entitlements lists. Since the June 21, 1985, OHA ruling does not satisfy the Southland claim, this Court concludes that the June 21, 1985, OHA order does not moot the South-

land claim. Accordingly, this Court will consider the merits of the pending Motions before it.

In November 1973, Congress enacted the EPAA which created comprehensive allocation and pricing regulations for crude oil and petroleum products. 15 U.S.C. § 753(a). Pursuant to the Act, the Federal Energy Administration ("FEA"), the predecessor to DOE, established a multi-tiered system of crude oil price controls. 10 C.F.R. Part 212, Sub-Part D (1984). Under the system, certain domestic crude oil was subject to "old" or "lower tier" ceiling prices while other domestic crude oil was subject to higher "new" or "upper tier" ceiling prices. Other categories of crude oil were exempt from price control.

The system placed those refiners forced to buy upper-tier or uncontrolled crude oil at a competitive disadvantage. To address this problem, FEA promulgated the Entitlements Program. 10 C.F.R. § 211.67 (1984); 39 Fed.Reg. 42246 (Dec. 4, 1974). The regulations roughly equalized the cost per barrel of crude oil among refiners through cash transfers between refiners rather than the physical transfer of oil. To achieve this result, each month refiners with greater than average access to price-controlled domestic crude oil bought "entitlements" from refiners with less than average access to low cost crude. 10 C.F.R. §§ 211.67(a)(1), (b)(1) and (c) (1984). The "entitlements" purchased or sold each month by refiners were published in a monthly entitlements notice to the refining industry. 10 C.F.R. § 211.67(i)(1) (1984). If the obligation to purchase entitlements would impair the refiner's "historically established financial position," then the refiner was entitled to "an adjustment" or "exception" to "prevent special hardship, inequity or unfair distribution of burdens. . . ." 42 U.S.C. § 7194(a).

The exceptions process functioned by OHA grants of prospective relief for six month periods based upon the financial projections of the refiner, to be followed by a

year-end review based on actual figures to determine whether the refiner had received inadequate or excessive exception relief. To implement the year-end findings, OHA issued orders permitting the refiner to sell or requiring it to buy additional entitlements. *Beacon Oil Company*, 3 FEA ¶ 83,209 (June 8, 1976). These buy or sell obligations were then reflected on subsequent entitlement notices.

In October 1983, the Presiding Officer of FERC ruled that Southland had unlawfully been required to pay $7,597,567.00 to the Entitlements Program for the years 1977 and 1978. FERC sought to restore this sum to Southland by relieving it of a purchase obligation imposed by an April 1, 1981, OHA order and by providing that:

> . . . the Economic Regulatory Administration of the Department of Energy shall in the next Entitlements Notice increase the value of entitlements [Southland] would otherwise be permitted to sell (or decrease the value of the entitlements it would otherwise be entitled to purchase) by $5,956,499.00 to the nearest entitlement. In the event no further Entitlements Notice is issued, DOE will take other appropriate action to implement this action.

On May 8, 1984, FERC issued an Order adopting the October 1983 Order of the Presiding Officer. The May 8, 1984 FERC Order is the order which Southland seeks to implement.

Prior to issuance of the FERC Order, President Reagan, on January 30, 1981, issued Executive Order 12287, exempting all crude oil and petroleum products from the price and allocation regulations (the "Decontrol Order"). The Decontrol Order authorized the Secretary of Energy "to take such actions as he deems necessary to implement [the] Order, including the promulgation of Entitlements Notices for periods prior to [the] Order and the establishment of a mechanism for entitlements adjustments for periods prior to [the] Order."

Shortly, after the Decontrol Order, DOE published official assurances that it "will publish" a December 1980 Entitlements Notice in February 1981 and that it "will also publish" a Notice in March reflecting transactions in the first 27 days of January, 1981. Ruling 1981-1, 46 Fed.Reg. 12946 (Feb. 19, 1981) (Answer #2). The December notice was issued February 20, 1981. 46 Fed. Reg. 14157 (Feb. 26, 1981).

Between March 1981 and December 1981, a series of Federal Court injunctions prevented the issuance of the January 1981 Entitlements Notice. *See, e.g., Mobil Oil Corporation v. DOE*, 520 F.Supp. 420 (N.D.N.Y.), *rev'd*, 659 F.2d 150 (Temp.Emer.Ct.App.), *cert. denied*, 454 U.S. 1110, 102 S.Ct. 687, 70 L.Ed.2d 651 (1981); *Indiana Farm Bureau Cooperative Association v. DOE*, [1981-84, Transfer Binder] Energy Mgmt. (CCH) ¶ 26,315 (S.D.Ind.1981); *Winston Refining Company v. DOE*, [1981-84 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,311 (M.D.N.C.1981). During this period, however, the Economic Regulatory Administration ("ERA") of the DOE conducted a rule-making proceeding "to provide for the orderly termination of the Crude Oil Entitlements Program." *See* 46 Fed.Reg. 15112 (March 3, 1981). ERA adopted regulations which contemplated issuance of a final "Clean-Up Notice" implementing adjustments relating to the period prior to decontrol, specifically including entitlements exceptions order. 10 C.F.R. § 211.64 (1984); 46 Fed.Reg. 36092 (July 13, 1981).

In 1981, when DOE established the Clean-Up Notice to liquidate entitlements rights and obligations, it noted its duty to implement all OHA exception decisions even after decontrol;

> It is the DOE's position that OHA may award entitlements exception relief after January 28, 1981, if the relief awarded relates to periods prior to decontrol. If OHA decides that a firm should have had

> exception relief at the time of decontrol, it is DOE's position that the intervention of decontrol did not negate the prior claim to exception relief and that DOE must give effect to such relief.

46 Fed.Reg. at 36093. With regard to claims finally adjudicated after issuance of the Clean-Up Notice, DOE stated:

> We have considered and rejected the notion of ignoring post-clean-up claims and obligations adjudicated by FERC or the courts. First, courts have made clear that agencies cannot extinguish rights *sub judice*, so we cannot purport to cut off claims and obligations merely because outstanding cases are not finally determined by the date of the clean-up list.

46 Fed. Reg. at 36096.

Despite these affirmations by the DOE of its obligations with regard to exception relief, in November 1983, the DOE announced its tentative decision to issue no further entitlements notices and questioned whether outstanding OHA, FERC and court decisions should be implemented notwithstanding non-publication of the January entitlement adjustment notices. 48 Fed.Reg. at 50482. Thereafter, on June 28, 1984, DOE announced its final decision to issue neither the January 1981 nor the Clean-Up Entitlements Notices. 49 Fed.Reg. 27410 (July 3, 1984). Simultaneously, the DOE announced a "tentative decision" to effectuate orders which provide for receipt of money by firms only "if an appropriate mechanism can be devised which does not unduly disrupt the market." 49 Fed.Reg. at 27148. DOE also announced its tentative decision not to enforce OHA and FERC orders requiring the repayment of excessive exception relief received by certain firms during the course of the entitlements program. *Id.* On January 9, 1985, DOE announced its "final decision" on exception orders, making final its "tentative decision" not to enforce such orders.

50 Fed.Reg. 1919 (January 14, 1985). Thus, refiners who, during the course of the Entitlements Program, were granted exception relief in excess of that warranted under the regulatory standards were excused from their obligation to repay the relief erroneously granted. Likewise, DOE also concluded that it had no legal obligation to give effect to exception orders providing for the payment of exception relief wrongfully denied during the operation of the program. 50 Fed.Reg. at 1923. DOE noted, however, that OHA was conducting proceedings to determine proper disposition of refund monies collected in cases involving violations of the crude oil pricing regulations. 50 Fed.Reg. at 1921. According to DOE, unpaid exception orders would be paid if OHA determines refiners as a class were injured by violations or alleged violations of the EPAA regulations. *Id.* As indicated above, the OHA determined on June 21, 1985, that refiners as a class had been injured and were entitled to an appropriate portion of the Crude Oil Overcharge Fund.

[2] DOE opposes the Motion of Southland for Partial Summary Judgment and moves to dismiss the complaint on the basis that the Decontrol Order rendered the May 8, 1984, FERC order discretionary since the FERC order presupposed the continued operation of the Entitlements Program and the publication of the Entitlements lists. DOE argues that the FERC order and the Decontrol Order left it to the discretion of DOE to determine what relief is appropriate in the event an entitlement list was not published. DOE also states that the implementation of the FERC order is conditional since it depends on whether OHA determines that refiners as a class were injured by violations of the EPAA. Now DOE contends that payment or receive orders must await the outcome in *Texaco*.

This Court finds that Southland is entitled to a declaratory judgment that the DOE has an unconditional and non-discretionary obligation to implement the May 8,

1984, FERC order, requiring DOE to restore to Southland $5,956,499.00. The Court further finds that the Motion of DOE to Dismiss or for Summary Judgment is denied as being frivolous. *See Texaco, Inc. v. DOE*, Civil Action No. 84-391-JLL (D.Del. March 20, 1985); *USA Petroleum v. DOE*, Civil Action No. 84-1017 (D.C. D.C. February 15, 1985); *Navaho Refining Company v. DOE*, [1981-84 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,484 (D.N.M. 1984), *Appeal dismissed*, [1981-84 Transfer Binder] Energy Mgmt. (CCH) ¶ 26,514 (Temp. Emer.Ct.App.1984). The decisions in *USA Petroleum* and *Navaho Refining Company* clearly mandate the implementation of the Southland exception order. DOE cannot now refuse to recognize the Southland exception order based upon its wholly unreasonable and insupportable interpretations of the FERC order and the Decontrol Order. Indeed, by virtue of the OHA order of June 21, 1985, DOE obviously recognizes that the Southland-type claims are entitled to relief despite its earlier contrary contentions.

In *Texaco, Inc. v. DOE*, Texaco sued to compel DOE to publish the entitlements list under the Entitlements Program, which DOE claimed it was relieved from doing by virtue of the Decontrol Order. The court held that the power of the DOE to amend the entitlements regulations ended after the Decontrol Order, and that the DOE could not now recoup that power by refusing to comply with the regulations. Further, the court stated that the regulations impose an obligation on DOE to issue entitlements for crude oil transactions occurring prior to the Decontrol Order.

[3] Based upon *Texaco, Inc. v. DOE*, this Court finds that DOE cannot attach other conditions to the relief Southland seeks since the power of DOE to amend the Entitlements regulations expired after decontrol. Consequently, whether the OHA determines that refiners as a class have been injured by violations of the EPAA is irrelevant to

implementation of the relief ordered Southland by FERC. However, at this juncture, the OHA has determined that refiners as a class were injured and has established a fund to reimburse Southland-type claims. The method of payment will be determined in "Stage II" of these proceedings.

In *Navaho Refining Company v. DOE, supra,* Navaho, like Southland, sought summary judgment declaring its right to restitution of over four million dollars in excessive payments Navaho was required to make to the Entitlements Program. DOE argued, as they do here, that the implementation of the FERC order was conditioned on issuance of a January 1981 Entitlements List. DOE also argued that the FERC order was not final. The court determined that FERC found that Navaho paid excessive sums into the Entitlements Program. Consequently, the court found that there was nothing more for DOE to adjudicate. "All that is required is implementation of the relief that has already been ordered." Thus, the court granted Navaho summary judgment.

In *USA Petroleum v. DOE, supra,* the same issue was before the court. The FERC order contained identical language to the May 8, 1984, FERC order at issue here—"in the event no further Entitlement Notice is issued, DOE will take other appropriate action to implement this order." The court ruled that the FERC order clearly required some relief, even if it did not specify the relief, and that DOE has a duty to provide relief through appropriate action. The court reasoned that the Decontrol Order ended price control of oil; it did not change or cancel the already adjudicated exceptions given to participants in the program. Consequently, the court granted the motion of USA for partial summary judgment.

These decisions, although unpublished and subject to appeal, convince this Court of the error and of the totally frivolous nature of the DOE position. Consequently, this

Court grants the Motion of Southland for Partial Summary Judgment and denies the Motion of DOE to Dismiss or for Summary Judgment. Furthermore, the Court orders DOE to report to this Court within fifteen (15) days the method by which it intends to implement the May 8, 1984, FERC order, whether through means of the crude oil overcharge fund or otherwise.

2. *Motion of DOE to Stay.*

[4] DOE moves to stay proceedings in this Court pending final resolution of *Texaco, Inc. v. DOE, supra,* which it has appealed and which it claims will moot the Southland claim. As explained by Southland in opposition to the Motion to Stay, DOE advanced the same argument in *USA Petroleum v. DOE, supra,* and lost. As stated by the court in *USA Petroleum,* the "DOE in this connection . . . is a dishonest litigant" and their track record to date has been one of "delay—delay—delay." Moreover, this Court is appalled at the manner in which the DOE uses the *Texaco* appeal to its advantage, arguing in this case that *Texaco* will be affirmed and will moot the Southland claims and in *Mobil Oil Corporation v. DOE,* Civil Action No. 81-CV-340 (N.D.N.Y.) that *Texaco* will be reversed and moot the claims of Mobil Oil Corporation that the data upon which the DOE will base any entitlements list is erroneous. It seems that the DOE is playing fast and loose with federal courts across the United States. It ends here. The Motion to Stay is denied and the DOE will within fifteen (15) days of the entry of this Order present to this Court its plans for implementing the FERC order.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J81-0170(B)

VGS CORPORATION, D/B/A SOUTHLAND OIL COMPANY AND GLOBE ASPHALT CO., INC.,
Plaintiffs

VS.

UNITED STATES DEPARTMENT OF ENERGY AND JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants

[Filed Dec. 4, 1985]

MEMORANDUM OPINION

The Court has before it the Motion of Plaintiffs, VGS Corporation, d/b/a Southland Oil Company, and Globe Asphalt Co., Inc. ("Southland"), for Summary Judgment. Southland's Motion seeks a mandamus, directing Defendants, United States Department of Energy and John S. Herrington, as Secretary of Energy ("DOE"), to pay Southland, within twenty (20) days of entry of this Court's Order, the sum of $5,956.499.00 as required by the May 8, 1984, Order of the Federal Energy Regulatory Commission ("FERC"), with interest from the date of the FERC Order until paid, calculated at the rate approved in *United States* v. *Exxon*, 561 F.Supp. 816, 864 (D.D.C. 1983), *aff'd.*, TECA Nos. DC-91 through DC-100, Slip Op. (Temp. Emer.Ct. App. July 1, 1985).

DOE does not dispute that Southland will receive its exception relief from the entitlements program and submits that the only issues are when Southland will receive its exception relief and whether Southland is entitled to interest from the date of the FERC Order. DOE argues that a mandamus directing DOE when to pay is improper since the timing of payment is a matter within the agency's discretion.

Mandamus is appropriate pursuant to 28 U.S.C. § 1361 (1982), to "compel an officer or employee of the United States or any agency thereof to perform a duty owed the plaintiff" if three elements are satisfied: (1) the plaintiff has a clear right to the relief; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available. *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132 (5th Cir. 1980).

There is no doubt that Southland has a clear right to the relief requested and that DOE has a clear duty to act. By virtue of the May 8, 1984, FERC Order, DOE is required to restore to Southland $5,956,499.00 which DOE wrongfully required Southland to pay under the Crude Oil Entitlements Program. By virtue of this Court's Memorandum Opinion and Order of July 12, 1985, in this case DOE has an unconditional and nondiscretionary obligation to implement the May 8, 1984, FERC Order which requires DOE to restore to Southland $5,956,499.00. The Court is also of the opinion that mandamus is the only adequate remedy available to Southland to obtain relief in light of DOE's past conduct in denying an obligation to afford relief and in delaying implementation of relief. Although DOE previously represented to the Court that the Office of Hearing and Appeal ("OHA") would implement relief if OHA found refiner class injury and although the OHA found refiner class injury and determined that a portion of crude oil overcharge funds would be used to fund

outstanding, finally adjudicated "receive orders" such as Southland's, DOE, in its June 21, 1985 decision, has required refiners with unpaid orders to file "applications" for payment, which, if "approved," would result in payment to a DOE escrow account pending resolution of the *Texaco v. DOE* litigation concerning issuance of final entitlements notices. As such, DOE has added yet another carrot to its stick. Yet, the DOE itself made resolution of the *Texaco* litigation and the issuance of further entitlements lists irrelevant to immediate payment of Southland by identifying crude oil overcharge funds as the source of payments. *See, e.g., Navaho Refining Company v. DOE*, Civil Action No. 83-1492-N (D.N.M. Sept. 27, 1985). Moreover, as the court in *Navaho Refining Company v. DOE*, Civil Action No. 83-1492-N (D.N.M July 23, 1985), commented "DOE has unilaterally granted its own stay by refusing to make any exception relief payments until after the *Texaco* dispute is over." This Court, in its previous ruling of July 12, 1985, specifically denied DOE's Motion to Stay this proceeding pending resolution of the *Texaco* litigation.

Under the statutory scheme for exception relief, 42 U.S.C. § 7194, DOE must insure that the exception relief it grants is meaningful and effective. *See Twin City Barge and Towing Company v. Slesinger*, 603 F.2d 197, 208 (TECA 1979). Moreover, DOE is required to conclude matters presented to it within a reasonable time. *Littlefield v. DOE*, 4 Energy Mgmt. Rep. (CCH) ¶ 26,492, 29,566 (D.D.C. June 29, 1984); *see also* 5 U.S.C. § 555H. DOE has violated both congressional mandates. *See Navaho Refining Company v. DOE, supra.* (D.N.M. July 23, 1985). Accordingly, mandamus is appropriate and will issue such that DOE will restore to Southland $5,156,499.00 within twenty (20) days of entry of this Order. *See Navaho Refining Company v. DOE, supra.*

Southland also seeks interest from the date of the FERC Order of May 8, 1984, calculated pursuant to

United States v. Exxon, supra. Southland notes that under DOE's June 21, 1985, Order, funds sufficient to pay exception orders are to be placed in an interest-bearing escrow account. Thus, Southland argues, DOE acknowledges its obligation to pay interest as compensation for the loss of the time-value of the money wrongfully taken from Southland. Yet, Southland claims that only by receiving interest from the date of the FERC Order will it be fully compensated for the loss of the time-value of this money. DOE simply argues that since Southland was not entitled to interest under the entitlements program, it is not entitled to interest here.

DOE's argument misses the point. We are no longer operating under the entitlements program by virtue of DOE's June 1984 decision not to issue further entitlements notices and its June 1985 decision that unpaid exception orders would be paid from crude oil overcharge funds if the OHA found refiner class injury. Thus, FERC's denial of interest of Southland is irrelevant to the present issue.

Pre-judgment interest is appropriate where the amount allegedly due was liquidated when the claim was originally made or where the denial of the claim was frivolous or in bad faith. *Piney Woods County Life School v. Shell Oil Company*, 539 F.Supp. 957, 988 (S.D.Miss. 1982), *aff'd in part, rev'd in part on other grounds*, 726 F.2d 225 (5th Cir. 1984. Southland's claim was reduced to a liquidated amount on May 1984, the date of the FERC Order. Moreover, this Court, in its Memorandum Opinion and Order of July 12, 1985, found that DOE's Motion to Dismiss or for Summary judgment was frivolous. Opinion, at 8. The basis of DOE's Motion was that it had a discretionary, conditional obligation to pay Southland pursuant to the FERC Order. In denying DOE's Motion as frivolous, the Court, in essence, found that DOE's denial of Southland's claim was frivolous.

Accordingly, Southland is entitled to pre-judgment interest from May 8, 1984, under either exception.

Southland further requests this Court to use the schedule of interest rates applied by the DOE in its administrative enforcement actions since February 1980. *See United States v. Exxon, supra.* Since DOE did not respond to this point, the Court will allow Southland to recover pre-judgment interest at the rate claimed.

A final judgment in accordance with this Memorandum Opinion will be entered.

ORDERED this the 4th day of December, 1985.

/s/ William H. Barbour, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J81-0170(B)

VGS CORPORATION, D/B/A SOUTHLAND OIL COMPANY AND GLOBE ASPHALT CO., INC.,
Plaintiffs

vs.

UNITED STATES DEPARTMENT OF ENERGY AND JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants

[Filed Dec. 4, 1985]

FINAL JUDGMENT

Upon consideration of Plaintiff's Motion for Summary Judgment, the briefs filed by the parties, and the entire record in this proceeding, all showing that there is no genuine issue as to any material fact and that Plaintiffs are entitled to a judgment as a matter of law; now, therefore,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is granted.

IT IS FURTHER ORDERED AND ADJUDGED that Defendant, Department of Energy shall pay to Plaintiff Southland Oil Company ("Southland"), within twenty days of entry of this Judgment, the sum of $5,956,499.00 as required by the May 8, 1984, Order of the Federal Energy Regulatory Commission ("FERC"), *Southland*

Oil Co./VGS Corp., 27 FERC ¶ 61,205 (May 8, 1984), with interest running from the date of such FERC Order to the date such sum is paid to Plaintiff Southland. Interest shall be calculated using the average prime rate for each calander quarter during that period, which shall be the arithmetic mean, to the nearest one-hundredth of one percent, of the prime rate value published in the Federal Reserve Bulletin for the fourth, third, and second months preceding the first month of the calendar quarter, and shall be compounded quarterly. *See U.S. v. Exxon Corp.*, 561 F.Supp. 816, 864 (D.D.C. 1983), *aff'd.* TECA Nos. DC-91 through DC-100, Slip op. (Temp. Emer. Ct. App., July 1, 1985).

ORDERED this the 4th day of December 1985.

/s/ William H. Barbour, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J81-0170(B)

JUDGE WILLIAM H. BARBOUR, JR.
VGS CORPORATION, D/B/A SOUTHLAND OIL COMPANY
AND GLOBE ASPHALT CO., INC.,
Plaintiffs,

v.

UNITED STATES DEPARTMENT OF ENERGY AND
JOHN S. HERRINGTON, AS SECRETARY OF ENERGY,
Defendants

[Filed Dec. 23, 1985]

STIPULATED ORDER

1. In accordance with the Court's judgment of December 4, 1985, defendant Department of Energy (DOE) will pay plaintiff VGS Corporation d/b/a Southland Oil Company (Southland) $5,956,499.00 pursuant to the terms of the Order of the Federal Energy Regulatory Commission (FERC) and interest in accordance with the agency's Order in *Amber Refining, Inc., et al.*, by December 24, 1985.

2. The parties agree that, upon receipt by Southland of said sums, payment of prejudgment interest from the date of the FERC Order will be stayed pending appeal by DOE to the Temporary Emergency Court of Appeals. Pending resolution of the prejudgment interest issue on

appeal, the amount of prejudgment interest shall be sequestered by DOE in an account bearing interest at the same rate as those administered under *Amber Refining, Inc., et al.*

3. DOE agrees, if an appeal is taken, to file its Notice of Appeal by January 3, 1986.

Respectfully submitted,

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SO ORDERED.

Date: 12-23-85

/s/ William H. Barbour, Jr.
United States District Judge

Section 504 of the Department of Energy Organization Act, 42 U.S.C. § 7194 (1982)

§ 7194. Requests for adjustments

(a) The Secretary or any officer designated by him shall provide for the making of such adjustments to any rule, regulation or order described in section 7191(a) of this title issued under the Federal Energy Administration Act [15 U.S.C. 761 et seq.], the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et seq..], the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], or the Energy Policy and Conservation Act [42 U.S.C. 6201 et seq.], consistent with the other purposes of the relevant Act, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens, and shall by rule, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or recission of, exception to, or exemption from, such rule, regulation or order. The Secretary or any such officer shall additionally insure that each decision on any application or petition requesting an adjustment shall specify the standards of hardship, inequity, or unfair distribution of burden by which any disposition was made, and the specific application of such standards to the facts contained in any such application or petition.

(b)(1) If any person is aggrieved or adversely affected by a denial of a request for adjustment under subsection (a) of this section such person may request a review of such denial by the Commission and may obtain judicial review in accordance with this subchapter when such a denial becomes final.

(2) The Commission shall, by rule, establish appropriate procedures, including a hearing when requested, for review of a denial. Action by the Commission under this section shall be considered final agency action within

the meaning of section 704 of title 5 and shall not be subject to further review by the Secretary or any officer or employee of the Department. Litigation involving judicial review of such action shall be the responsibility of the Secretary.

(Pub. L. 95-91, title V, § 504, Aug. 4, 1977, 91 Stat. 590.)

Section 702 of the Administrative Procedure Act,
as amended, 5 U.S.C. § 702 (1982)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other that money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)